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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*,
Petitioners,
v.
STATE OF SOUTH DAKOTA AND CITY OF OACOMA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, LYTTON BAND OF POMO INDIANS, SPOKANE TRIBE OF INDIANS, AND WINNEBAGO TRIBE OF NEBRASKA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*

Amici are federally recognized Indian tribes with a compelling interest in the continued authority of the Secretary of the Interior ("Secretary") to take lands into trust for their benefit pursuant to 25 U.S.C. § 465 ("§ 465").[1] The decision of the Eighth Circuit in *South*

[1] The parties have consented to the filing of this brief *amicus curiae*. A letter from the Solicitor General on behalf of Petitioners and consent forms from the Respondents have been filed with the Clerk of the Court.

Dakota, et al. v. United States Dept. of the Interior, et al., 69 F.3d 878 (8th Cir. 1995) holds § 465 unconstitutional. If permitted to stand, that decision would deny the Winnebago Tribe of Nebraska and all other tribes in the Eighth Circuit a mechanism by which the Secretary may transfer land into trust, and thus would frustrate Congressional policies—enacted in a series of statutes known by singular reference as the Indian Reorganization Act of 1934 ("IRA") 25 U.S.C. §§ 461 *et seq.*—to preserve tribal culture, strengthen tribal governments, enhance tribal self-determination, and promote tribal economic self-sufficiency. *See also* Felix S. Cohen, *Handbook of Federal Indian Law*, at 147 n.30, (2nd ed. 1982) ("Cohen").

The power of the Secretary to take land into trust is essential; a good land base, under tribal control, is the foundation of tribal vitality. The transfer of land into trust frees both the land and the tribes from state and local taxes, laws and regulations, the operation of which is antithetical to the existence of tribal government. Possession of land held in trust by the United States demonstrates the unique sovereign status of tribes. *Amici* within and without the Eighth Circuit are gravely concerned because the decision of the Court of Appeals disrupts over 60 years of legal precedent and administrative actions which have operated nationwide to provide a modest land base for tribes and tribal governments.[2]

REASONS FOR GRANTING THE WRIT

The *Amici* respectfully submit that the following are among the compelling reasons why the petition for a writ of certiorari should be granted:

[2] In varying degrees, each tribe has been adversely affected by the debilitating policy of assimilation which dominated federal Indian policy until Congress passed the IRA and related legislation. J. Collier, "The Genesis and Philosophy of the Indian Reorganization Act," *Indian Affairs and the Indian Reorganization Act, The Twenty Year Record, U. of Ariz. Press* (1954); *see also* Cohen, 127-151.

I. THE DECISION OF THE EIGHTH CIRCUIT JEOPARDIZES 60 YEARS OF LAW CONCERNING LANDS HELD IN TRUST BY THE UNITED STATES FOR FEDERALLY-RECOGNIZED SOVEREIGN INDIAN TRIBES, THE MOST IMPORTANT ASPECT OF FEDERAL INDIAN LAW AND THE UNDERPINNING FOR THE EXERCISE OF TRIBAL GOVERNMENTAL POWERS.

The trust status of Indian lands is a central and indispensable pillar of federal Indian law and federal Indian policy. Trust status of lands dictates virtually every aspect of tribal, federal and state relalations and defines the jurisdictional powers exercised by tribal governments, the extent of state jurisdiction, and federal jurisdiction over Indians. Federal taking of lands into trust furthers the policies of self-determination and economic self-sufficiency which are embodied within the IRA and which have been continuously reaffirmed by Congress.

This Court has recognized that the IRA was passed to fulfill "Congress' overriding goal of encouraging 'tribal self-sufficiency and economic development.'" *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980). Because these interrelated political and economic goals are dependent upon an adequate and federally protected tribal land base, Congress prohibited any further allotment of Indian lands[3] and expressly authorized the Secretary to take lands into trust for the benefit of Indians.

Approximately 9 million acres of land were taken into trust by the Secretary of the Interior under the IRA over the past 60 years. If the decision of the Eighth Circuit

[3] During the allotment era, tribal land holdings diminished from 138 million acres in 1887 to 48 million acres in 1934. *See County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 255-256 (1992); *Readjustment of Indian Affairs: Hearings on H.R. 7902 Before the House Committee on Indian Affairs*, 73d Cong., 2d Sess. 16 (1934) (Memorandum of John Collier, Commissioner of Indian Affairs).

is not corrected, it is not merely the status of virtually all of these 9 million acres of Indian trust land that will be placed in doubt. The status of land ownership is critical to jurisdictional powers exercised by the tribal governments. *See Montana v. United States*, 450 U.S. 554 (1981); *Brendale v. Confederated Tribes of Yakima Indian Nation*, 492 U.S. 408, 422-425 (1989). If this crucial underpinning is removed, all tribal governmental and regulatory authority over lands taken into trust under § 465 will be subject to challenge. The clearly mandated congressional goals of the IRA and the Indian Self-Determination and Education Assistance Act ("ISDEAA") 25 U.S.C. § 450f *et seq.* for self-governance and economic self-sufficiency could become impossible to achieve for many tribes.

The trust status of Indian lands also plays a significant role in defining the extent of state jurisdiction over Indian affairs and serves as a necessary buffer against state intrusion into those affairs. The Eighth Circuit decision, if left standing, would drastically alter this delicate arrangement. For example, State and local governments are barred from levying taxes on Indian trust lands. *Oklahoma Tax Commission v. Chickasaw Nation*, —— U.S. ——, 115 S. Ct. 2214 (1995); *Oklahoma Tax Commission v. Sac and Fox Nation*, 508 U.S. 114 (1993). This tax benefit of trust status is not happenstance—it effectuates the policy of the IRA by encouraging economic opportunity and protecting tribal self-governance. *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 265 (1992). If the trust status of land is removed, lands owned by tribal governments may be subject to state and local property taxes, again in derogation of the clear policies of the IRA and ISDEAA.

The Eighth Circuit's decision has direct implications for federal criminal law as well. Indian land status plays a crucial role in determining federal criminal jurisdiction

over Indians; it forms the jurisdictional basis for federal prosecuton of individual Indians for certain crimes under the Major Crimes Act. 18 U.S.C. §§ 1151 *et seq.* If the status of the land is in question, so is the federal criminal jurisdiction which depends thereon.

The Eighth Circuit's decision also calls into question thousands of mineral, grazing, and commercial leases of tribal trust lands covering over fifteen million acres. Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 Utah L. Rev. 1471 (1994). Upon the approval of the Secretary, tribes and individual Indians may lease trust lands for various purposes, including business opportunities. 25 U.S.C. §§ 415 *et seq.* In some situations, these leases may be for periods of up to 99 years. If the underlying land was unconstitutionally conveyed into trust, the Secretary's approved leases of those lands are at least in substantial doubt. Many private lessors have invested millions of dollars in reliance upon the validity of these leases.

At a minimum, the decision of the Eighth Circuit precludes any future fee-to-trust acquisitions for tribes in the Eighth Circuit, and possibly elsewhere. Achievement of the goals of the congressional policies discussed above and the Secretary's role in implementing them will be severely impeded. All this because the Court of Appeals reached out to decide a constitutional issue when it did not need to do so, and without considering all the relevant factors and doctrines involved.

II. THE COURT BELOW UNNECESSARILY ADDRESSED A CONSTITUTIONAL ISSUE.

As the dissent below correctly states, constitutional issues should not be reached unless absolutely necessary. 69 F.3d at 885 (Murphy, J., dissenting). *See Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 467 U.S. 138, 157 (1984) ("It is a fundamental rule of judicial restraint that prior to reaching any

constitutional questions, federal courts must consider nonconstitutional grounds for decision.") The Eighth Circuit ignored this "fundamental rule of judicial restraint" by unnecessarily ruling on the constitutional issue before exhausting other questions of statutory construction.

The primary focus of the appeal was the District Court's ruling that it lacked jurisdiction to review plaintiffs' claims under the Administrative Procedures Act, 5 U.S.C. §§ 701-706 ("APA") because the Quiet Title Act, 28 U.S.C. § 2409a did not waive the immunity of the United States in disputes involving Indian trust lands. The Eighth Circuit panel did not decide this critical threshold issue; instead, it leaped to the constitutional issue by relying on the Secretary's mere assertion that his decision was unreviewable.[4]

The Eighth Circuit's failure to address the nonconstitutional issue is especially egregious in this case because the availability of judicial review of an agency action is directly relevant to determining the constitutional issue it rushed to consider. As the dissent correctly noted:

> "[R]esolution of the APA inquiry could inform the analysis of the delegation issue . . . The availability of judicial review of the Secretary's actions may also serve to limit the delegation here . . . Judicial review 'is a factor weighing in favor of upholding a statute against a non-delegation challenge.'" (citing *United States v. Garfinkel*, 29 F.3d 451, 459 (8th Cir. 1994)).

69 F.3d at 885, 888.

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[4] As noted in the United States' Petition, the Department of the Interior has promulgated a regulation that addresses the reviewability issue and specifically provides for an opportunity for judicial review of the decision to take lands into trust before title is actually transferred to the United States. *See* Land Acquisitions (Nongaming), 61 Fed. Reg. 18,082 (1996) (to be codified at 25 C.F.R. 151.12).

The Eighth Circuit thus not only unnecessarily addressed the constitutional issue, but did so without considering all relevant factors.

III. THE NONDELEGATION DOCTRINE, WHICH HAS NOT BEEN INVOKED BY THIS COURT FOR OVER 60 YEARS, WAS INAPPROPRIATELY APPLIED BY THE COURT OF APPEALS; THE STATUTE IN QUESTION CLEARLY SURVIVES SCRUTINY UNDER THE DOCTRINE OF CONGRESSIONAL ACQUIESCENCE, A MORE RECENT AND MORE OFTEN USED DOCTRINE.

The Eighth Circuit erroneously applied the nondelegation doctrine, which has not been invoked by this Court to find an unconstitutional delegation to another government agency since *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), without considering the fact of congressional acquiescence in and reaffirmation of the delegation of authority made under § 465. This Court routinely applies the congressional acquiescence doctrine, *see, e.g., Haig v. Agee*, 453 U.S. 280, 300-301 (1981); *Dames & Moore v. Regan*, 453 U.S. 654, 678-682 (1981); *United States v. Midwest Oil Co.*, 236 U.S. 459, 472-73 (1915), even where the Executive exercises a power that has not been expressly delegated.

> "[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on 'Executive Power' vested in the President by § 1 of Art. II." Past practice does not, by itself, create power, but "long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the [action] has been [taken] in pursuance of its consent. . ."

Dames & Moore v. Regan, 453 U.S. 654, 686 (1981), *quoting United States v. Midwest Oil Co.*, 236 U.S. 459, 472-73 (1915).

Congress not only delegated the original authority to the Secretary; it has since also acquiesced in and consented to the 60-year-old practice of the Secretary taking land into trust for Indians pursuant to published regulations, such as 25 C.F.R. § 151. Indeed, rather than objecting to the manner in which the Secretary has been exercising this power, Congress instead expressly reaffirmed this delegation of authority to the Secretary by further extending its application in the Indian Land Consolidation Act of 1983 ("LCA"), 25 U.S.C. § 2201 *et seq.*

In considering the LCA, Congress was faced with the problem of a checkerboard pattern of land ownership within some reservations, and with heirships in allotments becoming increasingly fractionated. All this made economic use of the land by the tribes extremely difficult. There was, moreover, no comprehensive federal land consolidation authority in place for all tribes. *See* H.R. No. 97-908, 97th Cong., 2d Sess. 4 (1982), *reprinted in* 1982 U.S.S.C.A.N. 4415 *et seq.* The Secretary of the Interior reminded Congress that § 465 gave him land acquisition authority to address this problem, but noted that the IRA, of which § 465 was a part, did not apply to all tribes. *See* Letter to Hon. Morris K. Udall, Chair, House Committee on Interior and Insular Affairs, from Kenneth L. Smith, Assistant Secretary of the Interior—Indian Affairs, *reprinted in* 1982 U.S.S.C.A.N. at 4422 *et seq.* The Secretary recommended that Congress extend his § 465 authority to all tribes, unless they already had their own specific land acquisition and disposal acts, as some did. *Id.*

In enacting the LCA, Congress did exactly that. Section 2202 of the LCA provides, in part: "The provisions of section 465 of this title shall apply to all tribes notwithstanding the provisions of section 478 of this title . . . ." 25 U.S.C. § 2202. The legislative history explains:

> Section [2202] extends the provisions of Section 5 of the [IRA] to all tribes provided that nothing in this section is intended to supersede any previous Act of Congress which governs the acquisition of land for Indians in any specific tribe, reservation or State. The intent of the Committee is not to overrule any Act of Congress that explicitly purports to regulate land acquisitions and disposals within a specific area or for a specific tribe, unless such Act has already been amended or considered superseded by Section 5 of the Indian Reorganization Act. On the other hand, Section 5 of the Indian Reorganization Act would automatically be applicable to any tribe, reservation or area excluded from such Act, including tribes that have previously voted to reject the [IRA] pursuant to section 18 of such Act.

H.R. Rep. No. 97-908, *supra, reprinted in* 1982 U.S.S.C.A.N. at 4416.

The Eighth Circuit did not consider these issues. This Court should grant review because the nondelegation doctrine should not be applied where there is clear congressional acquiescence and reaffirmation of the delegation at issue.

IV. EGREGIOUS MISSTATEMENTS BY THE COURT OF APPEALS DEMONSTRATE A DISREGARD OF THE RECORD AND OF OTHER RELEVANT LAWS AND LIMITING REGULATIONS.

This Court should also exercise its supervisory review over the Court of Appeal's clear disregard of the record in this matter and the limiting effect of other laws and of the Secretary's own regulations. As part of its decision ruling the statute unconstitutional, the court below noted the allegation that the Tribe planned to conduct gaming on the land and that the Secretary was aware of the Tribe's true intentions. 69 F.3d at 880. This allegation was not borne out by the record below. In fact, the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C.

§§ 2701 *et seq.*, prohibits gaming on lands acquired in trust after 1988 unless the Governor of the State involved agrees with a secretarial determination that it is in the Tribe's best interest and is not detrimental to the surrounding community. 25 U.S.C. § 2719(b)(1)(A). The court did not take into account the provisions of IGRA that protect states' interests concerning tribal gaming on newly acquired Indian lands.

Among other exaggerated and misleading statements, the Eighth Circuit asserted that:

> By its literal terms, the statute permits the Secretary to purchase a factory, an office building, a residential subdivision, or a golf course in trust for an Indian tribe, thereby removing these properties from state and local tax rolls. Indeed, it would permit the Secretary to purchase the Empire State Building in trust for a tribal chieftain as a wedding present.
>
> * * * *
>
> [T]he statute leaves the Secretary free to acquire for a multitude of purposes, for example, to expand a reservation, to provide farm land for rural Indians, to provide a factory for unemployed urban Indians, to provide a golf course for tribal recreation, or to provide a lake home for a politically faithful tribal officer. . . .

Id. at 882.

These flagrantly misleading and absurd hypotheticals fail to acknowledge the existence of the regulations governing acquisitions of land into trust that are found in 25 C.F.R. § 151. Those regulations, drafted in accordance with the legislative history and policies of the IRA, guide the Secretary in his decision-making. For example, the only land that can be acquired for an individual Indian is land that is within a reservation or is already in trust status. 25 C.F.R. § 151.3(b). It would thus be impossible to acquire the Empire State Building for a

tribal chairperson, even if one were utterly to suspend credulity and posit that such an acquisition was an activity upon which the federal government might possibly be tempted to embark.

CONCLUSION

For the foregoing reasons, *Amici* respectfully submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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